APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 333, 334, 335, 336—August Term 1992

(Argued September 2, 1992 Decided November 19, 1992)

Docket Nos. 92-6147, 92-6149, 92-6151, 92-6157

IN RE: SIX GRAND JURY WITNESSES

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN DOE #1; JOHN DOE #3; JOHN DOE #5;
JOHN DOE #6,
Respondents-Appellants,

RICHARD ROE; XYZ CORPORATION,
Intervenors-Appellants.

Before:

FEINBERG, NEWMAN, and CARDAMONE,
Circuit Judges.

John Does #1, #3, #5 and #6, and the XYZ Corporation, and Richard Roe, its president, appeal from a June 8, 1992 order of the United States District Court for the

Eastern District of New York (Platt, C.J.) that directed them to answer questions posed by the government consistent with the district court's opinion and denied appellants' motion to quash the grand jury's subpoenas respecting those questions. The objections were based on the attorney-client privilege and the work product doctrine.

Order modified and, as modified, affirmed.

PETER J. ROMATOWSKI, Washington, D.C. (Clifton S. Elgarten, Cary H. Plamondon, Crowell & Moring, Washington, D.C.; Vincenti & Schickler, New York, New York, of counsel), *for Appellant XYZ Corporation.*

HERALD PRICE FAHRINGER, New York, New York (Diarmuid White, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York, New York, of counsel), *for Appellant Richard Roe.*

PETER J. TOMAO, Assistant United States Attorney for the Eastern District of New York (Andrew J. Maloney, United States Attorney, Peter A. Norling, Emily Berger, Charles S. Kleinberg, Assistant United States Attorneys for the Eastern District of New York, of counsel), *for Appellee United States of America.*

John F. Kaley, Weinberg, Kaley & Pergament, P.C., Garden City, New York, of counsel; James O. Druker, Kase & Druker, Garden City, New York, of counsel, *filed a joint brief for Respondents-Appellants John Doe #1, John Doe #3, John Doe #5, John Doe #6.*

CARDAMONE, *Circuit Judge*:

Believing it had been deliberately defrauded by a subcontractor under a government contract, the United States

commenced a criminal investigation and summoned several company employees to testify before a grand jury. When the contractor corporation learned it was the target of a criminal investigation it retained counsel, consulted with company officials and implemented an approach to evaluating the work performed that it believed would demonstrate that the government had received fair value for the equipment furnished. The employees responsible for monitoring the costs on the subject government project and who performed the analysis for defense counsel are the ones called before the grand jury. Their refusal to answer certain questions based on their corporate employer's assertion of the attorney-client privilege and the attorney's work product privilege precipitated this appeal.

Squarely presented for reconciliation are the seemingly conflicting interests of disclosure and secrecy. Discovery, designed to advance the pursuit of truth, takes the "sporting" element out of litigation by eliminating surprise. The inviolability of confidential communications between attorney and client and the protected privacy of the attorney's work product also contribute to the efficient functioning of the adversarial system's search for truth. Each ceases to be a privilege when it ceases to be a secret. The question before us asks to what extent may the prosecution obtain access to information defendant counsel alleges it has gathered; or, to phrase it another way, may these employees be compelled—despite the company's assertion of the two privileges—to testify before the grand jury with respect to their activities. With a few exceptions, we think they may be so compelled.

FACTS

The facts in this case are straightforward and undisputed. XYZ Corporation designs and builds timing devices for, among other uses, navigating satellites. A grand jury in the Eastern District of New York is investigating allegations that XYZ and its president, Richard Roe, con-

spired to defraud the United States in violation of 18 U.S.C. §§ 286 and 371 and committed major fraud against the United States in violation of § 1031 by submitting claims containing false statements in violation of § 1001. The investigation concerns XYZ's performance under contracts to design and build a frequency source amplifier, a voltage controlled crystal oscillator, a frequency multiplier power amplifier, a calibration upconverter, a reference generator unit, and a surface acoustic wave oscillator. The government believes XYZ illegally inflated its costs when submitting vouchers for work performed as a subcontractor on contracts called the "Fox" contracts that XYZ had with a prime government contractor producing this sophisticated space equipment.

The investigation of XYZ for making false and inflated claims for payment under the Fox contracts started after "stop work" orders were issued in February 1988. Subsequently, certain of the Fox contracts were terminated altogether; others were renegotiated and continued on a reduced scale. XYZ's payment claims relate to the work it performed up to the date of the stop-work orders. It also made proposals on the reconfigured continuing contracts. The government alleges that XYZ created false books and records in support of its termination payment claims and proposals and that its original corporate records on these contracts were either destroyed or discarded. At the commencement of its investigation in 1990 the government obtained two broad search warrants and a subpoena for "all documents related to the Fox contracts," resulting in its gathering truckloads of documents from XYZ amounting to at least 170 boxes of corporate records.

XYZ retained counsel to represent it in connection with the investigation. In January 1991 defense counsel requested that an analysis of costs be made by certain high-ranking employees—John Does #1 through #6. These employees were engineering manager, program manager,

microwave systems manager, director of marketing, program administrator, and vice-president of systems engineering, respectively. As such, they were the employees responsible for monitoring XYZ's costs and were familiar with the Fox contracts. In conducting their analysis each of them chose what documents they would review. In early 1992 all six employees appeared before the grand jury.

During the course of their grand jury testimony John Does #1, #3, #5 and #6 refused to answer questions with respect to the analysis they had made of the Fox contracts because this work had been done at the direction of XYZ's counsel. The witnesses read a statement setting forth their understanding that the corporation was asserting the confidentiality of the attorney-client privilege with respect to the witnesses' communication with defense counsel and also the confidentiality under the work product privilege of "all information and materials generated" at the direction of counsel.

On January 27, 1992 counsel for the John Doe witnesses advised XYZ's counsel that in pre-grand jury interviews the government prosecutor had questioned them about communications with XYZ's counsel. Defense counsel thereupon suggested that the witnesses be shown documents of the government's own choosing and be asked to analyze them without reference to the analysis witnesses had previously conducted for the defense. In rebuffing this approach, the prosecutor explained that this procedure would not elicit the witnesses' opinions regarding which of the government documents would be relevant to determine the costs incurred under the Fox contracts.

On March 10, 1992 the government obtained a show cause order as to why John Does #1 through #6 should not be held in contempt for refusing to answer certain questions before the grand jury. The actions against

John Does #2 and #4 were later discontinued because they were not asked any disputed questions. The unanswered questions, further questions intended to be asked when the witnesses were recalled, and additional questions outlined in the government's trial brief of May 4, 1992 were submitted to defense counsel. All of these questions were collected and submitted to us after oral argument in a letter dated Sept. 3, 1992 from Assistant U.S. Attorney Peter J. Tomao. The 23 unanswered questions are set forth and attached to this opinion as Appendix A.

After conducting an *in camera* review of the witnesses' analyses, the district court issued an order dated June 8, 1992 directing the witnesses to respond to the questions. This direction was based on the trial court's finding that the information sought by the prosecutor was limited to underlying facts and that the witnesses' responses would not infringe on either of the privileges XYZ Corporation had asserted so long as—the district court carefully added—the questions were not connected to or identified with the analyses the witnesses had conducted at the request of defense counsel. From this order John Does #1, 3, 5 and 6, XYZ Corporation and Richard Roe, its president, appeal. On June 23, 1992 we granted a motion to expedite this appeal.

DISCUSSION

Appellants contend that they may rightfully refuse to answer the questions set forth in Appendix A because the information gathered in the employees' analysis is protected by the attorney-client privilege, and that absent a waiver, the prosecutor has no right to discover the communications of these analyses to defense counsel no matter how great the need. Appellants also assert this information is immune from grand jury inquiry under the attorney's work product doctrine. Specifically, they assert that these privileges protect the "substance" of the work

product, not simply the written analysis, which the government concedes it is not entitled to. The government responds that the information it seeks is limited to underlying facts and opinions relating to the "Fox" contracts within the knowledge of these witnesses and that it is entitled to their testimony before the grand jury because neither the attorney-client privilege nor the work product doctrine protects the requested information. We discuss each of these privileges in general and then in the context of the questions asked of the John Doe witnesses in this case.

I *Attorney-Client Privilege*

Fed. R. Civ. P. 26 permits discovery of any relevant matter not subject to privilege. All agree that the rules of discovery are to be applied broadly, but that according the discovery rules liberal treatment does not license opposing counsel to discover anything and everything. Limitations are imposed on discovery sought in bad faith, to harass or oppress the party subject to it, when it is irrelevant, or when the examination is on matters protected by a recognized privilege. *See Hickman v. Taylor,* 329 U.S. 495, 507-08 (1947). As Fed. R. Evid. 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

One of the privileges recognized in Rule 501 is the attorney-client privilege. It is, according to Professor Wigmore, the oldest of the common law privileges dating back to the early 16th century, 8 John H. Wigmore,

On Evidence § 2290 (McNaughton rev. ed. 1961), and has encouraged clients to confide in their attorneys fully and frankly, free from the apprehension of disclosure, for nearly 500 years.

The privilege began as an exception to the testimonial compulsion for every witness' evidence. Generally, all relevant proof is essential if determinations by the fact finder are to be made on a complete trial record. Absent full disclosure of all the relevant facts, confidence in the fair administration of justice would cease to exist. *See United States v. Nixon*, 418 U.S. 683, 709 (1974). Because the attorney-client privilege remains an exception that may withhold relevant information at the pre-trial or the trial stage of a criminal prosecution or civil proceeding, it may be invoked to hold secret only those communications made in confidence to a lawyer to obtain legal counsel that would not have been made without the existence of the privilege. *See Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (Friendly, J.).

We recognize that the availability of advice from an attorney is essential if corporations are to comply with the ever-increasing complexities of federal law; and, if that advice is to be sought and given there must be predictable certainty as to which communications will be protected. *See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984). Where the client is a corporation, as here, the privilege extends to communications between a lawyer and his or her client—both information provided to the lawyer by the client and professional advice given by an attorney that discloses such information. *See Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). Yet, the cloak of the privilege simply protects the communication from discovery, the underlying information contained in the communication is not shielded from discovery.

II *Work Product Privilege*

Whether the work product of counsel gathered and devised in preparation for litigation, such as facts, legal contentions or trial tactics, may be discovered is a highly controversial area of the law, as this case illustrates. The boundaries of the doctrine are far from fixed. *See Special Project, The Work Product Doctrine*, 68 Cornell L. Rev. 760, 762 (1983). The leading Supreme Court case, *Hickman v. Taylor*, 329 U.S. 495 (1947), sheds some light on the issues raised here. There defendant's counsel obtained written and oral statements from witnesses in preparation for trial. When plaintiff's counsel sought copies of the statements and a detailed synopsis of the oral statements to examine these witnesses, the Court held that absent a showing of need the statements were protected from discovery as work product of the lawyer. *Id.* at 510.

From that holding, it can be gleaned that the work product doctrine provides a zone of privacy for a lawyer; the doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary. *See United States v. Nobles*, 422 U.S. 225, 238 (1975). While unwarranted questions probing the attorney's files and theory of the case are barred in criminal as well as civil litigation, *see id.* at 238 n.12, relevant, non-privileged facts may be discovered from an attorney's files where their production is essential to the opponent's preparation of its case. *See Hickman*, 329 U.S. at 511. And, in *Nobles*, the Supreme Court ruled the privilege was not available to prevent disclosure of a defense investigator's report that attacked the credibility of a key prosecution witness, reasoning that once defense counsel elected to produce the investigator as a witness the privilege was waived. 422 U.S. at 239.

Both common law principles embodied in the attorney-client privilege and the work product doctrine are to be

applied in a common sense way in light of reason and experience as determined on a case-by-case basis. *See* Fed. R. Evid. 501; *In Re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224 (2d Cir. 1984). We now proceed to analyze the present questions on that basis by examining the pertinent factors in this case.

III *Privileges With Respect to Present Grand Jury Questions*

Subsequent to the John Does' grand jury appearances, a number of the questions that had not been answered before the grand jury were, in effect, answered in April 1992 affidavits sworn to by several of the John Doe witnesses. These affidavits appeared to have been submitted to show that the direction for the analysis had come from defense counsel and that information thereby gathered was to be turned over to defense counsel and kept confidential. As in *Nobles*, once the questions were answered for defense counsel's purposes, their contents were available for the prosecution's use. *See* 422 U.S. at 239. Those questions that have already been answered therefore are not listed in Appendix A.

We turn to the pending questions. To begin with it seems plain that merely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects of the Fox contracts under either claim of privilege. Were counsel to succeed in such a tactic, the government would never be able to conduct a full and complete investigation of an alleged crime because the critical witnesses would have been effectively silenced, nor for the same reason would the government be able to present all the evidence at trial regarding a defendant's guilt or innocence.

Examining the 23 questions we see no trampling of either privilege, except in four questions. Question #8 "With whom did you discuss this analysis," #9 "What was said [other than to counsel]," #14 "What informa-

tion did you give them [anyone other than [XYZ's] attorney]," and question #15 "When did you give this information to anyone other than [XYZ's] attorney." The form of these four questions, considered in sequence, risks violation of the attorney-client privilege because the witness, in responding, might be understood to be implying to the grand jury that he had conveyed privileged information to the lawyer. Appellee's efforts now to include bracketed exclusions of communications to counsel minimize the risk, but a rephrasing of the questions is preferable to avoid suggesting that the witness is being asked about any aspect of any communication he might have had with the lawyer.

Although an attorney-client communication is privileged and may not be divulged, *see Fisher,* 425 U.S. at 403, the underlying information or substance of the communication is not, as appellants incorrectly believe, so privileged. Further, the remaining 19 questions seek underlying factual information to which the prosecutor is clearly entitled. The factual information is not protected by the attorney-client privilege just because the information was developed in anticipation of litigation.

Moreover, the affidavits examined by the district court *in camera* undercut appellants' assertion regarding the privileged nature of much of the information as attorney's work product. For example, the affidavits contain identical paragraphs and emphasize that the assignment required the witness to make "judgments" and "estimates" and that the results embodied the witness' "mental impressions," all of which concededly are privileged aspects of work product. But nowhere in the affidavits do appellants clarify what those judgments or mental impressions were—even in a very general manner. In fact, the attachments to the affidavits appear to be nothing but straightforward calculations from raw data, making it difficult to imagine what "mental impressions" were involved.

As a consequence, there is no common law privilege barring the government from obtaining answers to these 19 questions from the John Doe witnesses.

CONCLUSION

The district court's order compelling John Doe witnesses #1, #3, #5, and #6 to answer certain listed questions is modified by striking questions #8, #9, #14, and #15 and, as modified, the order is in all other respects affirmed.

APPENDIX A

I. QUESTIONS WHICH WITNESSES REFUSED TO ANSWER ON THE GROUNDS OF PRIVILEGE BEFORE THE GRAND JURY SET OUT IN LETTER FROM PETER J. TOMAO, DATED MARCH 17, 1992 (A 56-60).

1. Q. (With regard to an analysis of the status of the documentation on project 11369 and 11370 as of the time of the stop work order) what did you do?

2. Q. Are you prepared to tell us at this time what analysis you performed (on the Fox contracts)?

3. Q. (With regard to subsequent analysis performed on the Fox contracts) [W]hat analysis did you conduct?

4. Q. [W]hat reviews of the Fox contracts did you conduct?

5. Q. (With regard to the initial analysis performed on the Fox contracts) Do you have any reason as you sit here today to say whether or not these were accurate?

6. Q. (With regard to a study conducted after July 1988) Are you able to tell us what that study was?

II. ADDITIONAL QUESTIONS SET FORTH IN PETER J. TOMAO'S LETTER DATED MARCH 17, 1992.

A. Have you made an effort to determine the total number of labor hours and/or amount of labor costs which were incurred in connection with the Fox contracts?

7. Q. If so, what analysis did you perform?

8. Q. With whom did you discuss this analysis?

9. Q. What was said [other than to counsel]?

10. Q. What records did you review?

11. Q. What information did they give you?

12. Q. When did they give you that information?

13. Q. What conclusions did you draw?

14. Q. What information did you give them [anyone other than XYZ's attorney]?

15. Q. When did you give this information to them [anyone other than XYZ's attorney]?

B. Have you determined that additional hours were worked and/or costs were incurred on the Fox contracts which were not reflected in the original XYZ time sheets and other records?

16. Q. If so, how many or how much?

C. Do you have an opinion as to whether additional hours were worked and/or costs were incurred on the Fox contracts which were not reflected in the original XYZ time sheets and other records?

17. Q. If so, how many or how much?

III. QUESTIONS SET FORTH IN DECLARATION OF CHARLES S. KLEINBERG DATED MAY 4, 1992 (A 198-99).

18. Q. What documents would you need to review to estimate the total labor and other costs incurred by XYZ in connection with the Fox contracts prior to termination?

19. Q. What questions would you need answers to in order to estimate the total labor

and other costs incurred by XYZ in connection with the Fox contracts prior to termination?

20. Q. From whom would you need to get these answers?

21. Q. [the questions identified in answer to (18) and (19)]

22. Q. Estimate the total labor hours and labor costs incurred by XYZ in connection with the Fox contracts prior to termination?

23. Q. Estimate the total costs incurred in XYZ in connection with the Fox contracts prior to termination?

APPENDIX B

UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 MISC. 068(TCP)

IN RE SIX GRAND JURY WITNESSES

MEMORANDUM AND ORDER

PLATT, Chief Judge.

The government has moved to compel six witnesses to show cause why they should not be held in contempt for refusing to answer certain questions posed to them in connection with a subpoena seeking their testimony before a grand jury. For the reasons that follow, the motion to intervene is granted, the motion to quash the grand jury subpoenas is granted in part and denied in part, the motion for release of the grand jury transcripts is denied, and the government's motion to hold the respondents in contempt is denied.

BACKGROUND

On March 10, 1992, after the government applied for and received an *ex parte* Order to Show Cause, this Court ordered [John Doe #1 through John Doe #6] (collectively "the respondents") to show cause why they should not be held in contempt for refusing to answer questions asked of them when they were testifying before a grand jury empaneled in this district. The grand jury was investigating allegations that [XYZ Corporation ("XYZ")]

and its senior management, including [Richard Roe, XYZ's] president, had defrauded the United States by inflating costs on certain subcontracts (referred to as the "Fox" contracts) between [XYZ] and TRW, Inc., in connection with highly classified work that TRW, Inc. was performing for an unnamed government agency. Grand jury subpoenas were issued to the six respondents, all of whom are [XYZ] employees, and the respondents, who had entered into immunity agreements with the government, appeared with counsel before the grand jury. When questioned about analyses they conducted regarding the "Fox" contracts, [John Doe #1, John Doe #3, John Doe #4, John Doe #5 and John Doe #6] refused to answer any questions regarding the analyses because they were prepared at the direction of [XYZ's] counsel. [John Doe #2], during preparation for his grand jury testimony, also refused to answer similar questions regarding the analyses. In addition, [John Doe #6] refused to answer any questions regarding statements made by [Roe] at a meeting attended by [Roe], [Roe's] counsel, [XYZ's] counsel and [John Doe #6] arguing that these statements were protected by the attorney-client privilege.[1]

Before the original return date, the government agreed to discontinue this action without prejudice against [John Doe #2] and [John Doe #4] and agreed to provide the respondents, [XYZ] and [Roe] with a list of questions the respondents refused to answer as well as a list of questions the government intended to ask the respondents when they were recalled to testify before the grand jury. The parties then returned on March 27, 1992 for argument since [XYZ] and [Roe] argued that both sets of questions submitted by the government called for the respondents to reveal matters protected by the attorney-client privilege and the work product privilege. At that point, the Court directed counsel for [XYZ] to submit for

[1] The details of the meeting are described in greater detail at *infra* pp. 6-7.

in camera inspection, copies of the analysis in order to ascertain whether the questions asked by the government in fact infringed upon these privileges.

Currently before the Court are the government's Order to Show Cause, [XYZ's] and [Roe's] motion to intervene in these proceedings pursuant to Fed. R. Civ. Pro. 24(a)(2), [XYZ's], [Roe's] and the respondents' motion to quash the subpoenas, and the respondents' motion seeking production, to respondents' counsel, of the grand jury transcripts of the testimony that is the subject of the government's Order to Show Cause.

DISCUSSION

I. [XYZ's] and [Roe's] Motion to Intervene

As an initial matter, the Court is faced with the motions by [XYZ] and [Roe] to intervene in these proceedings.[2] [XYZ] and [Roe] seek to intervene on the basis that the questions asked by the government call for the disclosure of information that is protected by [XYZ's] and [Roe's] attorney-client privilege and work product privilege.

Intervention in an action is permitted:

> when the applicant claims an interest relating to . . . [the] transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. Pro. 24(a)(2). Here, both [XYZ] and [Roe] are the holders of the asserted privileges that form the basis of the respondents' refusal to answer the questions.

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[2] Both [Roe] and [XYZ] were served with a copy of the Order to Show Cause and to date, both parties have participated in these proceedings.

Since the government is seeking to compel the respondents to answer the questions, it is clear that this proceeding may potentially "impair or impede" [XYZ's] and [Roe's] ability to protect their respective privileges. *See In re Grand Jury Empanelled October 18, 1979*, 633 F.2d 282, 286 (3d Cir. 1980); *In re Grand Jury Proceedings (Katz)*, 623 F.2d 122, 125 (2d Cir. 1980); *In re Grand Jury Proceedings (Phe, Inc.)*, 640 F. Supp. 149, 151-52 (E.D.N.C. 1986); *but see In re Grand Jury Subpoena Duces Tecum, August 1986*, 658 F. Supp. 474, 483 (D. Md. 1987) (denying motion to intervene because third party failed to demonstrate more than a "general interest" in the proceedings).

Furthermore, although the respondents have refused to answer the questions posed to them, the respondents have indicated that if this Court finds that the questions do not infringe upon privileged matters and directs them to answer the questions, they will.[3] Based upon the respondents' representations and the fact that the respondents are third parties asserting a privilege on behalf of [XYZ] and [Roe], it is apparent that [XYZ's] and [Roe's] interests are not adequately represented by the respondents, *see In re Grand Jury Proceedings (Phe. Inc.)*, 640 F. Supp. at 151, and therefore, [XYZ's] and [Roe's] motion to intervene must be granted.

II. Statements Made by [Roe] at the January 11, 1991 Meeting:

The government seeks to compel [John Doe #6] to answer questions regarding statements made by [Roe] at a meeting held on January 11, 1991.[4] This meeting was

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[3] *See* Affidavit of John F. Kaley, dated March 13, 1992, ¶ 4; Letter of James O. Drucker, dated May 5, 1992, to Charles Kleinberg, at 1.

[4] [John Doe #6] refused to answer the following question:

Do you intend to assert a privilege with respect to any statements that Mr. [Roe] volunteered to you while you and he were

held at the request of Crowell & Moring, a law firm retained by [XYZ] for the sole purpose of representing and advising [XYZ] in connection with the government's investigation into the "Fox" contracts. *See* Affidavit of Peter J. Romatowski (hereinafter "Romatowski Aff."), dated March 25, 1992, ¶ 2. Present at the January 11th meeting were [XYZ's] regular counsel, Herald Fahringer, [Roe's] attorney, two accountants from Price, Waterhouse, who were specially retained by Crowell & Moring to assist in the investigation, Peter Romatowski and other attorneys from Crowell & Moring, and [Roe]. *See id.* ¶ 10. According to [XYZ's] counsel, the purpose of this meeting was "to further the analysis being performed by Price, Waterhouse . . . and to give direction to [XYZ] personnel to perform certain related analyses," *id.*, to assist in the formulation of a defense strategy. [John Doe #6] was summoned to the meeting and in addition to participating in the discussion, he was directed to conduct an analysis. *See id.* ¶ 11; Affidavit of [John Doe #6] (hereinafter "[John Doe #6] Aff."), ¶ 6. While [John Doe #6] was present, [Roe] made the statements which the Government wishes to learn the substance of and which [John Doe #6] has declined to reveal on the basis that the statements are protected by the attorney-client privilege.

The government argues that the statements made by [Roe] are not privileged for a number of reasons. First, the government argues that the statements made by [Roe] were not kept confidential because [John Doe #6], as a third party, was present at the time the statements were

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in the presence of [XYZ's] attorneys, and even if Mr. [Roe] was not responding to one of the attorney's questions?

Letter of Peter J. Tomao, dated March 17, 1992, to All Counsel, at 3.

While [John Doe #6] is not a target of the grand jury investigation, [Roe] is an individual target and is aware of this fact. *See* Declaration of Charles Kleinberg (hereinafter "Kleinberg Declaration"), dated May 4, 1992, ¶ 5.

made and [John Doe #6] had not entered into a joint defense agreement. Next, the government alleges that the statements made at the meeting were not kept confidential because [John Doe #6] "conveyed the substance of those statements to other [XYZ] employees." Government's Memorandum of Law (hereinafter "Gov'ts Initial Memo."), at 10. Taken together, the government argues that the fact that [John Doe #6] was present and that [John Doe #6] did not keep these statements confidential mean that [Roe's] statements were not "made and maintained," *In re LTV Securities Litigation*, 89 F.R.D. 595, 603 (N.D. Tex. 1981), in confidence and thus, the statements lost the protection of the attorney-client privilege. The government also argues that [Roe] "volunteered" certain statements at the meeting and since [John Doe #6] refused to answer questions regarding statements made by [Roe] that were not in response to questions from counsel, the privilege does not apply. In addition, the government submits that it has not been shown that a "common interest" existed between [John Doe #6] and [Roe], which protects these communications. Finally, the government implies that this was a situation where counsel "manufactured" a privileged situation to block the disclosure of certain information. As part of this argument, the government alleges that "[t]here was no need for [Roe] to be present and to make statements when corporate counsel met with [John Doe #6] and asked [John Doe #6] to perform an analysis." Government's Surreply Memorandum of Law (hereinafter "Gov'ts Third Memo."), at 12.

[XYZ] argues that the statements made by [Roe] are covered by the attorney-client privilege. Under *Upjohn v. United States*, 449 U.S. 383, 390 (1981), the attorney-client privilege applies to corporations and protects the "*giving of professional advice . . . [and] also the giving of information to the lawyer to enable him to give sound and informed advice.*" (emphasis added). In addition, [XYZ] argues that the January 11, 1991 meeting was confidential because [John Doe #6] is not the equivalent

of a "third party" whose presence would destroy the meeting's confidentiality. *Upjohn* allows [XYZ] to claim confidentiality when [XYZ's] counsel engages in communications with all of its employees, not just a "control group." Furthermore, [XYZ] argues that [XYZ] and [Roe] expressly entered into a joint defense agreement with [Roe], in order "to take full advantage of the 'common interest rule' ", Romatowski Aff. ¶ 4, as formulated in *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), *cert. denied*, 112 S. Ct. 55 (1991). Thus, since the parties had a common interest, in the process of conducting their investigation, they could share confidential communications without waiving the privilege.

[Roe] also argues that his statements, which responded to an inquiry from [XYZ's] counsel, are covered by the attorney-client privilege. Under *Upjohn*, the attorney-client privilege extends to all corporate employees, regardless of whether one or a number of employees are the subject of corporate counsel's inquiry. [Roe] also argues that [XYZ] and [Roe] had a "common interest" in preparing their defense, which was memorialized in a written joint defense agreement, thus warranting protection of the communications. In addition, in [Roe's] view, [John Doe #6] by virtue of his position at [XYZ] as a project manager on some of the "Fox" contracts, had a common interest with [Roe] and [XYZ]. Based upon this "common interest," [John Doe #6's] presence did not destroy the confidentiality of the meeting. [Roe] also argues that his statements are protected by the work product privilege, as defined in *Hickman v. Taylor*, 329 U.S. 495 (1947), because his statements were given to attorneys who were collecting information necessary to render legal advice and to prepare a defense.

As the parties asserting the existence of a privilege, [XYZ] and [Roe] have the burden of establishing that a valid privilege exists. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976); *von Bulow v. von Bulow*,

811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987); *United States v. Davis*, 131 F.R.D. 391, 398 (S.D.N.Y. 1990).

The attorney-client privilege is designed to protect "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher*, 425 U.S. at 403 (citing 8 J. Wigmore, *Evidence*, § 2292 (McNaughton rev. 1961)). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients," *Upjohn*, 449 U.S. at 389, and focuses "on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation." *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The attorney-client privilege, however, does not protect all communications between a lawyer and a client and for the privilege to attach, a party must demonstrate that:

> (1) the asserted holder of the privilege has sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); 8 J. Wigmore, *Evidence*, § 2292, at 554. In this case, the disputed issues are whether the statements made by [Roe]

were made without the presence of a stranger and whether these statements were communicated to strangers and thus, were not maintained in confidence.

An otherwise privileged communication is not protected by the attorney-client privilege if the communication is made in the presence of strangers. *See, e.g., United States v. Landof,* 591 F.2d 36, 39 (9th Cir. 1978); *Davis,* 131 F.R.D. at 398. The privilege is also lost if a privileged communication is disclosed to third parties. *See, e.g., United States v. Rockwell Int'l,* 897 F.2d 1255, 1265 (3d Cir. 1990); *United States v. Gotti,* 771 F. Supp. 535, 542 (E.D.N.Y. 1991).

Regarding the first issue, it is a close question but this Court is of the opinion that on balance [John Doe #6] is not the equivalent of a "stranger" and thus, [John Doe #6's] presence did not breach the privilege. As the project manager for four of the "Fox" contracts, it was logical for [XYZ's] counsel to request [John Doe #6's] presence so that he could participate in the discussion conducted at the meeting, when the purposes of the meeting was to formulate a defense strategy. Furthermore, [XYZ's] counsel called [John Doe #6] into the meeting to discuss what analyses should be performed as part of the defense strategy and to assign [John Doe #6] the job of actually performing the analyses. From the affidavits submitted, it is clear that [John Doe #6] was not called into the meeting for any purpose other than to participate in the discussions and to be given instructions as to what analyses he should perform.

As to the second issue, [John Doe #6] was told that the conversations should be kept confidential. [John Doe #6] did have discussions with other [XYZ] employees regarding the January 11th meeting, but these discussions with, at the most, six other [XYZ] employees were for the purpose of giving instructions to these employees so they could assist in the preparation of the analyses. *See* [John Doe #6] Aff. ¶¶ 8-9. In his affidavit, [John Doe #6] states that with the exceptions of the named [XYZ] em-

ployees, [John Doe #6] "did not speak to or discuss with any other employee the nature of the assignment conducted or the conclusions I reached." *Id.* ¶ 10. While the government alleges that [John Doe #6] disclosed what was discussed at the meeting to other [XYZ] employees, the government has produced no evidence to support this allegation and, absent such proof, this Court will accept [John Doe #6's] sworn statement that he did not communicate with any [XYZ] employee except those who were necessary to assist him with the formulation of the analyses. The instructions that [John Doe #6] gave to these employees may not have resulted in a breach of the attorney-client privilege because, as the Supreme Court stated in *Upjohn*, in the course of conducting the analyses that [John Doe #6] was preparing for [XYZ's] counsel, [John Doe #6] was able to communicate with employees "who might be helpful in providing the requested information." 449 U.S. at 387. However, the only way that this may be determined is through an examination of the statements made by [John Doe #6] to the [XYZ] employees which will have to be taken under oath *in camera* and submitted *in camera* to the Court.

The government's argument that the privilege does not apply to the statements that [Roe] allegedly "volunteered" is rejected. First, [Roe's] statements were made in the context of a discussion regarding [XYZ's] and [Roe's] defense strategy and thus, are part of the "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389. [Roe's] attorney, counsel for [XYZ] and [John Doe #6] also state that [Roe's] statements were not "volunteered"; rather, they were in response to questions from counsel and were made in the course of the discussion conducted at the meeting. *See* Affidavit of Herald Fahringer ¶ 6; Romatowski Aff. ¶ 12; [John Doe #6] Aff. ¶ 6.

[XYZ] and [Roe] have met their burden of establishing that the statements made by [Roe] are protected by the

attorney-client privilege. Accordingly, with regard to the government's request that [John Doe #6] be ordered to respond to questions concerning the January 11th meeting, [XYZ's] and [Roe's] motion to quash is granted.[5]

III. Analyses Performed by [XYZ] Employees:

The government seeks to have the respondents answer questions regarding the analyses they undertook of the "Fox" contracts. [XYZ] argues that this information is protected under both the attorney-client and the work product privileges. [Roe] also argues in favor of the application of the work product privilege to the analyses.

The Court directed [XYZ] to submit copies of the analyses in order to conduct an *in camera* review of the documents. In addition to the analyses, [XYZ's] counsel submitted an *in camera* affidavit describing, in greater detail, the methods used in conducting the analyses and what part they played in [XYZ's] defense strategy. In addition, [XYZ] also submitted for *in camera* inspection, more detailed affidavits from each of the respondents. These affidavits describe what kind of analyses each of the respondents conducted at the request of counsel and includes the results of each of the respondents' analyses.

Both [XYZ] and the government agree that the actual written analyses produced by the respondents are privileged and therefore, the government does not seek the analyses or seek to discover any information or documents pertaining to or resulting from communications with counsel. *See* Government's Reply Memorandum of Law at 18; [XYZ's] Third Memorandum of Law (hereinatfer "[XYZ's] Third Memo.") at 4. [XYZ] asserts, however, that asking the respondents any questions regarding the analyses would infringe upon the attorney-client and work product privileges. [XYZ] argues that by asking

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[5] Since we have determined that the statements made by [Roe] at the January 11, 1991 meeting are covered by the attorney-client privilege, it is unnecessary to consider [Roe's] claim that his statements are protected by the work product privilege.

the respondents questions concerning the analysis each respondent produced results in the government "do[ing] indirectly what it is prohibited to do directly," [XYZ's] Third Memo. at 4, and is a breach of [XYZ's] privileges.

In support of its argument, [XYZ] notes that the Supreme Court found that the attorney-client "privilege exists to protect . . . the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390. [XYZ] argues that, as in *Upjohn*, the analyses were conducted for the purpose of assisting [XYZ's] counsel and there was no doubt that the work was commissioned by [XYZ's] counsel. Each respondent analyzed matters that were within the scope of their duties and knew that the circumstances of the investigation meant that, with the exception of communication with other employees who would be helpful in performing the analyses, the investigation was to be kept confidential. In [XYZ's] view, the questions posed by the government inquire into areas that are covered by the holding in *Upjohn* and are thus protected from disclosure. [XYZ] also argues that if the respondents were to answer the questions, the details of the analyses as well as privileged communications would be revealed.

[XYZ], as well as [Roe], argue that the analyses are protected as "opinion" work product and such work product is entitled to greater protection than ordinary work product. *See P&B Marina, Ltd. Partnership v. LoGrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991); *Coleco Indus., Inc. v. Universal City Studios*, 110 F.R.D. 688, 690 (S.D.N.Y. 1986). Both argue the information sought includes the mental impressions, opinions, estimates and conclusions of the respondents and therefore, is protected. Finally, [XYZ] argues that the government has not met the standard for compelled disclosure of this work product. Since the government has in its possession the documents that the respondents consulted and has had the respondents' cooperation, the government has not met

the test of Rule 26 because it cannot show that it has a "substantial need" for the material and that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. Pro. 26(b)(3).

The government states that it does not seek information which is protected by either the attorney-client or the work product privileges. Rather, it is only seeking to ascertain the underlying facts and opinions which are within the knowledge of each respondent and such information is not privileged just because it was later communicated to an attorney. In the government's view, this information is not protected by the work product privilege because that privilege "shields only prepared materials, not the facts upon which the materials were based." *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 160 (E.D.N.Y. 1986). Here, the government seeks what the witnesses knew or learned after they reviewed preexisting documents and underlying facts that are within a witness' own knowledge are not privileged, even if the facts were gathered at counsel's direction. Since the information sought consists of facts and opinions, the government argues that [XYZ] cannot rely on the protections of Federal Rule of Civil Procedure 26(b)(3) since that rule only shields the protection of documents or other tangible things.

Finally, if this Court finds that the information is protected by the work product doctrine, the government submits that disclosure of this information can be ordered since the information can be classified as "fact" work product as opposed to "opinion" work product.[6] *See*

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[6] "Fact" work product consists of information that reflects, events, dates, occurrences and a witness' own analyses and opinions while "opinion" work product consists of an attorney's own mental impressions and thought. *See, e.g., Hickman*, 308 U.S. at 508; *Westinghouse Elec. Corp. v. Republic of the Phillipines*, 951 F.2d 1414, 1431 n.18 (3d Cir. 1991); *In re Grand Jury Proceeding, John Doe*, 867 F.2d 539, 541 (9th Cir. 1989).

Hickman, 329 U.S. at 495. "Fact" work product is entitled to less protection than "opinion" work product and disclosure can be compelled upon a showing of "substantial need" by the government. *See In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982). Here, the government argues that it has met its burden of showing "substantial need" because the information is unobtainable from other sources and may provide the government with evidence relevant to crimes currently under investigation.

The government also argues that this information is not protected by the attorney-client privilege. First, the information is not privileged since the government only seeks the facts that the witnesses reconstructed. Next, [XYZ] has not shown that disclosure of the respondents' own opinions would disclose their attorneys' thought processes. Finally, unlike the situation in *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985), the government stresses that it is not seeking to ascertain what documents [XYZ's] counsel selected from the large volume of documents involved, but only wants to learn what documents the respondents selected and reviewed in connection with the analyses.

As discussed earlier, the objective of the attorney-client privilege is to promote full disclosure of all necessary information between an attorney and a client. *See Upjohn*, 449 U.S. at 389; *Trammel*, 445 U.S. at 51. One important aspect of the privilege, however, is that it only applies to the disclosure of communications to an attorney, not to the disclosure of underlying facts to an attorney. *See Upjohn*, 449 U.S. at 395; *United States v. Doe*, 1992 WL 57374, at 6 (2d Cir. Mar. 23, 1992); *Davis*, 131 F.R.D. at 404. As one court aptly noted:

> A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowl-

> edge merely because he incorporated a statement of such fact into his communication to his attorney.

Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (quoted in *Upjohn*, 449 U.S. at 385-86).

The work product privilege is designed to protect the "private memoranda and personal recollections prepared or formed by," *Hickman*, 329 U.S. at 510, an attorney in anticipation of litigation or for trial. The work product privilege also extends to criminal cases, including grand jury proceedings, and to material prepared by agents for an attorney. *See United States v. Nobles*, 422 U.S. 225, 238 (1975); *In re Grand Jury Proceedings*, 473 F.2d 840, 842 (8th Cir. 1973).

As has been stated, the government is not seeking to obtain information regarding communications with [XYZ's] counsel or any documents that were produced by or at the direction of counsel. In this case, the information sought is limited to the underlying facts and opinions regarding the "Fox" contracts possessed by or within the knowledge of the respondents.

Based upon a review of the affidavits and the analyses submitted for *in camera* inspection as well as a review of the questions that the government has asked and intends to ask the respondents, this Court finds that the respondents must answer the questions. Responses to questions regarding the analyses would not infringe upon the attorney-client or work product privileges as long as the questions are not connected to or identified with the analyses the respondents' conducted at the request of [XYZ's] counsel. For example, once a respondent has testified to his estimates regarding the total labor hours and costs and the total costs incurred in connection with the "Fox" contracts,[7] a respondent may be asked as to how he

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[7] This discussion refers to the questions numbered (5) and (6) contained in the Kleinberg Declaration, at 6.

arrived at such estimates and as to how the estimates may be applied in this case. The government, however, may not ask the respondent whether any of this information was reported to [XYZ's] counsel. Accordingly, with respect to the questions regarding the analyses, [XYZ's] and [Roe's] motion to quash is denied.

IV. Release of Grand Jury Testimony

The respondents have moved for disclosure of their grand jury testimony. The respondents argue that in order to defend against the contempt proceeding, they must have the transcripts of their testimony. The government opposes this request.

Since there is a "long-established policy," *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958), of maintaining the secrecy of grand jury materials, Federal Rule of Criminal Procedure 6(e)(3)(C)(i) requires a party seeking to obtain the transcript of grand jury proceeding to make a strong showing of particularized need. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 434 (1983); *see also United States v. Moten*, 582 F.2d 654, 662 (2d Cir. 1978) (providing reasons why secrecy is normally accorded to active grand jury proceedings). A grand jury witness "is entitled to a transcript of his own testimony absent a clear showing by the government that other interests outweigh the witness' [sic] right to such transcript." *In re Sealed Motion*, 880 F.2d 1367, 1371 (D.C. Cir. 1989).

Here, the government has shown that other interests outweigh the respondents' interest. The situation presented in this case is unlike the situations presented in *In re Sealed Motion* or Judge Glasser's recent case, *In re Subpoena of James Heimerle*, 1992 WL 584890 (E.D. N.Y. Mar. 4, 1992). In both cases, a request for the release of grand jury testimony was granted. In both cases, however, the grand jury had completed their proceedings while in this case the grand jury investigation

is still proceeding. The government is seeking additional testimony from the respondents and as stated by the government, the release of the respondents' grand jury transcripts may result in premature disclosure of the nature and direction of the grand jury investigation. The government has provided the respondents with a list of questions the respondents refused to answer, thus according the respondents with the ability to formulate a defense to the government's motion. Accordingly, the respondents' request for transcripts of their grand jury testimony is denied.

V. Entry of a Contempt Order

[XYZ] and [Roe] argue that if the motion to quash the subpoenas is denied, the Court should not hold the respondents in contempt, but instead should order the respondents to comply with the subpoenas. [XYZ] and [Roe] assert that they would have a right to appeal this Court's order even if the respondents had not been held in contempt. Relying upon *Katz*, 623 F.2d 122, 124 (2d Cir. 1980), [XYZ] and [Roe] argue that since the respondents are not under their control, the respondents are not the holders of the privileges that have been asserted and the respondents have indicated that they are unwilling to suffer a finding that they are in contempt, for the purposes of a final order, it is unnecessary for this Court to hold the respondents in contempt.

Since the grand jury subpoenas are directed against third parties who are not the holders of the privileges involved, this Court declines to enter an order finding the respondents in contempt and directs the respondents to answer the questions posed by the government, consistent with this opinion.

CONCLUSION

To summarize the above rulings: [XYZ's] and [Roe's] motion to intervene is granted. The motion to quash the grand jury subpoenas with respect to the questions regarding the January 11th meeting attended by [John Doe #6], [Roe] and others is granted. The motion to quash the grand jury subpoenas with respect to the questions regarding the analyses conducted by the respondents is denied, consistent with the guidelines set forth in this opinion. The motion to hold the respondents in contempt is denied. The motion for release of the transcripts of the respondents' grand jury testimony is denied.

SO ORDERED.

/s/ Thomas C. Platt
Chief Judge, U.S.D.C.

Dated: Brooklyn, New York
June 8, 1992

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January one thousand nine hundred and ninety-three.

IN RE: SIX GRAND JURY WITNESSES

Docket Number: 92-6147

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN DOE #1; JOHN DOE #3; JOHN DOE #5;
JOHN DOE #6,
Respondents-Appellants,

RICHARD ROE; XYZ CORPORATION,
Intervenors-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Respondents-Appellants, John Doe #1, John Doe #3, John Doe #5, and John Doe #6, and Intervenors-Appellants, Richard Roe and XYZ Corporation.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH
Clerk

By: /s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk